

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 38

WCC No. 2005-1237

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BONNIE KOBE

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** The claimant injured her neck while working as a bank teller and customer service representative. She seeks permanent partial disability benefits.

**Held:** The claimant failed to persuade the Court that she has suffered a wage loss as a result of her injury. She has no wage loss on a per-hour basis. Although she is now working part time instead of full time, the Court is unpersuaded that she is unable to work full time or unable to obtain full-time employment. She therefore has no wage loss and is not entitled to permanent partial disability benefits.

**Topics:**

**Benefits: Permanent Partial Disability Benefits.** Under 2001 laws, a claimant is not entitled to permanent partial disability benefits, other than an impairment award based on an impairment rating, unless he or she has a wage loss.

**Benefits: Permanent Partial Disability Benefits.** Where a claim for permanent partial disability benefits is based on an alleged inability to work full time rather than a reduction in an hourly wage, the claimant must persuade the Court that in fact she is unable to work full time.

¶1 The trial in this matter was held in Helena, Montana, on May 11, 2005. The petitioner was present and represented by Mr. Bernard J. Everett. The respondent was represented by Mr. Charles G. Adams.

¶2 Exhibits: Exhibits 1 through 13 were admitted without objection.

¶3 Witnesses and Depositions: The petitioner and Linda Collins testified at trial. In addition, the parties submitted the petitioner's deposition to the Court for its consideration.

¶4 Issues Presented: The sole issue before the Court is whether the claimant is entitled to permanent partial disability benefits in addition to the impairment award she has already received.

¶5 Having considered the Pre-Trial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the deposition and exhibits, and the arguments of the parties, the Court makes the following:

#### FINDINGS OF FACT

¶6 The petitioner (hereinafter "claimant") has lived in Dillon, Montana, since approximately 1997.

¶7 The claimant worked for the Ruby Valley National Bank in Twin Bridges, Montana, as a vault teller and customer service representative from October 10, 1998, until January 31, 2004. (Ex. 1.) She worked eight hour days, five days a week.

¶8 Twin Bridges was approximately thirty miles from the claimant's home in Dillon and required an approximate twenty-five- to thirty-minute commute each way.

¶9 On November 13, 2001, the claimant injured her neck at work while attempting to move a bag containing \$500 in quarters.

¶10 At the time of the injury, Ruby Valley National Bank was insured by the Montana State Fund (State Fund). The State Fund accepted liability for the injury and has paid medical benefits and a 6 percent impairment award.

¶11 Since her injury, the claimant has been treated for neck and right shoulder pain by several medical providers. She is currently being treated by Dr. Allen M. Weinert, a physiatrist.

¶12 Except for medical appointments, the claimant did not lose time from work on account of her injury.

¶13 The claimant continued working full time at the Ruby Valley National Bank following her injury. However, her pain increased over her work week but her pain diminished again with rest over the weekends. The claimant's long drive to and from work contributed to her pain. (Kobe Dep. at 12, 18, and Ex. 1.)

¶14 In the fall of 2003, the claimant decided to seek employment closer to home. In late January 2004, she secured a part-time teller position at the Beaverhead Bank in Dillon, a four-minute commute from her home. (Trial Test.) She has worked there since that time.

¶15 The claimant's job at the Beaverhead Bank is three days a week, nine hours each day. She works Monday through Wednesday.

¶16 No physician has medically restricted her from full-time work. Dr. Weinert concurred that eliminating the commute to Twin Bridges would reduce her pain but did not recommend she quit her job. (Ex. 2.) He opined that she is capable of full-time work. (*Id.*)

¶17 The claimant testified that she does not believe she can work full time. However, I am not persuaded by her testimony, at least with respect to full-time work in Dillon. Factors affecting my determination include the following:

(a) By obtaining work in Dillon, the claimant has eliminated the commute, which was a significant factor in her pain.

(b) The claimant was able to work at the Ruby Valley National Bank full time for two years following her injury, and the level of her pain decreased over that time.

(c) The claimant actually works longer hours per day with the change in employment (nine hours versus eight hours), albeit she works fewer days.

¶18 In seeking only part-time work, one of the claimant's considerations was her desire to see her grandchildren more often. She is also sufficiently secure enough financially that she does not have to work.

¶19 At least at the present time, I am unconvinced that working full time locally in Dillon would be unbearable and am persuaded that the claimant could work full time if she were motivated to do so.

¶20 The claimant has not applied for full-time employment but believes that if she wished to go full time at the Beaverhead Bank she could do so. There are two other banks in Dillon. The claimant's twenty-six years of banking experience and her ability to secure

employment at the Beaverhead Bank indicates she is competitive for full-time positions. There is no vocational evidence indicating the contrary.

¶21 The claimant did not suffer a wage loss on an hourly basis. She earns as much per hour at the Beaverhead Bank as she did at the Ruby Valley National Bank.

¶22 The claimant has failed to persuade me that she could not obtain full-time employment in Dillon at the same wage she earned at the Ruby Valley National Bank.

### CONCLUSIONS OF LAW

¶23 This case is governed by the 2001 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶24 The claimant bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks. *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶25 The claimant is seeking permanent partial disability benefits in addition to the impairment award she has already received. Her request is governed by section 39-71-703, MCA (2001), which provides in relevant part:

**39-71-703. Compensation for permanent partial disability.** (1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award if that worker:

(a) has an actual wage loss as a result of the injury; and

(b) has a permanent impairment rating that:

(i) is established by objective medical findings; and

(ii) is more than zero as determined by the latest edition of the American medical association Guides to the Evaluation of Permanent Impairment.

(2) When a worker receives an impairment rating as the result of a compensable injury and has no actual wage loss as a result of the injury, the worker is eligible for an impairment award only.

As can be seen from subsection (1), eligibility for permanent partial disability benefits in addition to any impairment award requires a claimant to demonstrate a wage loss.

¶26 The claimant has suffered no wage loss on an hourly wage basis since her post-injury wages are equal to or greater than her time-of-injury hourly wage. However, in prior cases, this Court has held that wage loss encompasses lost wages due to a decrease in the number of hours a claimant is able to work. *Callaway v. Valor Ins. Co., Inc.*, 2004 MTWCC 46, ¶ 41; *SLH v. State Comp. Ins. Fund*, 1999 MTWCC 6, ¶¶ 64-65. Thus, the claimant has suffered a wage loss if, as she claims, she can no longer work full time.

¶27 Section 39-71-116(1), MCA, provides, “Actual wage loss’ means that the wages that a worker earns or is qualified to earn after the worker reaches maximum healing are less than the actual wages the worker received at the time of the injury.” While the claimant is in fact working only part time, that is by choice. She has not been medically disapproved for full-time work and since wage loss is measured by what the claimant is capable of earning, not what she is in fact earning, she must persuade the Court that in fact her pain precludes her from working full time.

¶28 I am unpersuaded that the claimant is unable to work full time, or that full-time employment at a wage comparable to her wage at Ruby Valley National Bank is unavailable to her in Dillon. I therefore conclude that she is not entitled to permanent partial disability benefits.

#### JUDGMENT

¶29 The claimant is not entitled to permanent partial disability benefits. Her petition is therefore **dismissed** with prejudice.

¶30 This JUDGMENT is certified as final for purposes of appeal.

¶31 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 8<sup>th</sup> day of July, 2005.

(SEAL)

/s/ Mike McCarter  
JUDGE

c: Mr. Bernard J. Everett  
Mr. Charles G. Adams  
Submitted: May 11, 2005